Supreme Court, U.S.
FILED

No. ___

04-796 SEP 20 2004

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CAREMARK RX, INC. (FORMERLY MEDPARTNERS, INC.),
Petitioner,

v.

J. BROOKE JOHNSTON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

---

PETITION FOR A WRIT OF CERTIORARI

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September 20, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the award of punitive damages in this case constitutes impermissible "double-counting" under this Court's decision in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003, since the "compensatory" damages supporting the award are entirely punitive in nature.

PARTIES TO THE PROCEEDING

Petitioner Caremark Rx, Inc. (formerly MedPartners, Inc.) is a publicly held company. Appellee in the Alabama Supreme Court and defendant/cross-claimant in the Circuit Court of Jefferson County was J. Brooke Johnston.

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IN THE

Supreme Court of the United States

No. ___

CAREMARK RX, INC. (FORMERLY MEDPARTNERS, INC.),
Petitioner,

v.

J. BROOKE JOHNSTON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

Caremark Rx, Inc. (formerly MedPartners, Inc.) ("Caremark") petitions for a writ of certiorari to review the judgment of the Alabama Supreme Court in this case.

OPINIONS BELOW

The order of the Circuit Court of Jefferson County, App. at 9a, is not officially reported. The trial court's Amended Final Order, App. at 14a, is similarly unreported. The judgment of the Alabama Supreme Court, App. 1a-2a, is not officially reported. The Alabama Supreme Court overruled Caremark's application for rehearing. App. 3a. This judgment is not officially reported. The order of the Alabama Supreme Court denying Caremark's emergency motion for stay of execution of the judgment, App. 4a, is not officially reported.

JURISDICTION

The judgment of the Alabama Supreme Court was entered on May 14, 2004, and Caremark's application for rehearing was overruled on August 13, 2004. Caremark's emergency motion for stay of execution of the judgment was denied on August 31, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in part, as follows:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT

Caremark, based in Nashville, Tennessee, is a leading manager of prescription drug benefits for health care plans. Respondent J. Brooke Johnston was general counsel of Caremark's predecessor (MedPartners, Inc.) for only two years, from May 1996 to July 1998, when he resigned. Trial Transcript at 792. During these two years, Johnston, an experienced corporate lawyer, was highly compensated for his work. Trial Transcript at 843-44.

Caremark later sued Johnston in Alabama state court for, among other things, breach of fiduciary duty, and Johnston counterclaimed for breach of his employment contract and fraud. App. at 9a-10a (Order of Circuit Court of Jefferson County). After a mistrial caused by the misconduct of Johnston's counsel in front of the jury, the case went to trial again in January 2002.

Johnston sought damages for breach of contract in the amount of $2 million. Trial Transcript at 843. Johnston testified he gave up a position at his previous law firm to join Caremark, and that he was building a practice from scratch

after he resigned as General Counsel. Trial Transcript at 1134-36. He further testified that the funds he sought for breach of contract were intended to provide him with three years of income while he started this new firm and rebuilt his practice:

> *Question by Mr. Cook (counsel to Johnston):*
>
> > And these severance payments that were provided for in your employment contract, what was the purpose of having a contract with severance payments like existed in your contract?
>
> *Mr. Johnston:*
>
> > From my perspective, it was going to provide me with three years of income so that my family could be supported while I built my practice back up so that I could make the kind of living to which—that I was making before I made the move to MedPartners.

Trial Transcript at 1135. Johnston was awarded nearly this entire amount, $1.86 million, as compensatory damages for breach of contract. App. at 17a (verdict form). In other words, the damages Johnston was awarded for breach of contract *fully* compensated him for his inability to return to his previous firm.

Johnston's fraud claim was based solely on his own testimony about a single, oral, private, unrecorded, and short conversation he had with one member of Caremark's board of directors. Johnston testified that the director told him in January 1998 that Caremark would "honor" his employment contract if he remained with the company. Trial Transcript at 1105. Johnston presented no other evidence of fraud. The jury credited Johnston's testimony (and discredited contrary testimony from the director, who denied the conversation ever occurred) and awarded Johnston $1 million for "fraud." App. at 17a (verdict form). These damages were entirely punitive in nature. In denying Caremark's post-trial motions attacking

the verdiet, the trial court cited Johnston's inability to return to his previous firm as a basis for the "fraud" damages:

> Johnston testified that Scrushy's representation, whether innocently, deliberately, or recklessly, was false and as a result he sustained damages. He testified that at the time he left his employment with Caremark he had lost his opportunity to return to his old firm and that he was forced to begin a new law practice which would take five years to build to the point that he was earning compensation that was equal to the compensation he was earning at Caremark and which he would earn at his old firm of approximately Two Hundred Thousand Dollars ($200,000.00) per year. The jury, therefore, could believe that Johnston sustained compensatory damages in the sum of One Million Dollars ($1,000,000.00) as a result of the misrepresentation.

App. at 11a (Order of Circuit Court of Jefferson County). Accordingly, these damages could not have been anything *but* punitive in nature, because, by Johnston's own testimony, the damages he received for breach of contract fully compensated him for the time it would take to start and build a new firm. Moreover, Johnston presented no evidence that he suffered actual loss as a result of this alleged fraud. He did not offer any evidence of his income at his prior law firm, nor of his earnings during the start-up period for his new practice. The lack of evidence of any actual loss further underscores the entirely punitive nature of this damages award.

Caremark moved the trial court for judgment as a matter of law, or for a new trial or remittitur. In that motion, Caremark argued that the punitive damages award violated its right to due process under this Court's decisions in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), and *BMW of North America v. Gore*, 517 U.S. 559 (1996). *Id.* At that time, this Court had not yet decided *State Farm*. Caremark also cited and argued both *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539

So. 2d 218 (Ala. 1989), cases on which this Court placed great emphasis in affirming the Alabama punitive damages judgment in *Haslip*. *See* 499 U.S. at 20 (noting that there is "meaningful and adequate review by the trial court [in Alabama] whenever a jury has fixed the punitive damages.")

Although the trial court found "the reprehensibility of the conduct of the Defendant [Caremark] in this action is low," the court nevertheless denied Caremark's motion and refused to remit any of the damages awarded. App. at 12a.

Caremark thereafter appealed to the Alabama Supreme Court, which affirmed without opinion and, despite a request by Caremark, without oral argument. App. at 1a-2a. Caremark sought rehearing and in its application cited and argued this Court's relevant punitive damages decisions, including *State Farm*. The application was denied, again without opinion, on August 13, 2004. App. at 3a.

REASONS FOR GRANTING THE PETITION

This case presents an important and unsettled due process question concerning the impermissible imposition of double-counted punitive damages, described by this Court in *State Farm*, 538 U.S. at 426, 429. As explained below, the judgment awarding punitive damages that was imposed by the Jefferson County Circuit Court and upheld by the Alabama Supreme Court rested entirely on an award of "compensatory" damages that was, in fact, entirely punitive in nature. For this reason, Caremark respectfully requests that this Court grant certiorari to clarify its decision in *State Farm*. In the alternative, in the event that this Court grants State Farm's petition for certiorari in *State Farm v. Campbell*, 73 U.S.L.W. 3077 (U.S. July 20, 2004) (No. 04-116), Caremark respectfully requests that this Court hold this petition, and then grant certiorari, vacate the judgment of the Alabama Supreme Court, and remand this case for further proceedings in light of this Court's opinion in that case.

In outlining the impropriety of the grossly excessive punitive damages award upheld by the Utah Supreme Court in *State Farm*, this Court noted that the plaintiffs' compensatory damages, which were solely based on their claim of emotional distress, were "based on a component which was duplicated in the punitive award." 538 U.S. at 426. To insure that the punitive damages imposed against State Farm were not unjustified, this Court instructed that "[a]n application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (*a portion of which contained a punitive element*), likely would justify an award at or near the amount of compensatory damages." *Id.* at 429 (emphasis added).

In the instant case, unlike in *State Farm*, the *entire* amount of the only damages that can support an award of punitive damages—the damages awarded for "fraud"—are punitive in nature. Consequently, the ratio of punitive damages to compensatory damages is potentially infinite, and plainly unconstitutional.

Johnston sought, and the jury awarded him, the value of a very generous severance package. This amount, as Johnston testified, was intended "as a measure to replace lost income to fill in the years it takes to start up a [law] practice from scratch." Brief of Appellee Johnston (Ala. Supreme Court No. 1020026) (Jan. 23, 2003); *see also* Trial Transcript at 1135.

This is exactly the same item of damage Johnston claimed as a result of the "fraud" committed in his short, private conversation with one Caremark director. The trial court, in denying Caremark's motion for judgment as a matter of law or a new trial, held that Johnston's "fraud" damages were "that at the time he left his employment with Caremark, he had lost his opportunity to return to his old firm and that he was forced to begin a new law practice . . . ." Order of Circuit Court of Jefferson County, at 3. Because the "fraud"

damages were entirely duplicative of the breach of contract damages, the damages the jury awarded for "fraud"—even more than the emotional distress damages in *State Farm*—must have been punitive in nature.

This Court has consistently emphasized that punitive damages must bear a reasonable relationship to compensatory damages. *State Farm*, 538 U.S. at 425 ("Single-digit multipliers are more likely to comport with due process . . . ."); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2001) (noting that appellate courts are "equally capable" with trial courts of applying the *Gore* ratio guideposts); *Gore*, 517 U.S. at 581 ("[A] comparison between the compensatory award and the punitive award is significant."); *Haslip*, 499 U.S. at 23 (noting that ratio "may be close to the line"). In this case, such a reasonable relationship does not exist, because the "compensatory" portion of the "fraud" damages—the only portion of Johnston's compensatory damages that can support an award of punitive damages—is zero. Johnston presented no evidence of any damages other than his breach of contract damages. The $1 million in "fraud" damages awarded by the jury, accordingly, was entirely punitive in nature, and any punitive damages based upon this "fraud" award are impermissibly double-counted.

Although some lower courts have heeded this Court's admonition against duplicating the punitive element of a compensatory damages award, *see, e.g., Parrish v. Sollecito*, 280 F. Supp. 2d 145, 164 (S.D.N.Y. 2003) (pointing to an award of attorneys' fees in a sexual discrimination case as "including a certain punitive element" and to that extent as favoring a lesser rather than greater award of punitive damages); *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413, 424 (S.D.N.Y. 2003) ("[D]espite the stock bromides generally pronouncing that the aim of compensatory damages is solely to restore the plaintiff's loss and not to

punish the defendant, in fact this restitutional remedy does possess a deterrent and punitive aspect as well. This objective manifests especially in cases in which the wrongdoer is known and the injury is monetarily recompensed to the full extent of the proven damages . . . ."); *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738, 763 (Cal. Ct. App. 2003) ("Our independent review in this case convinces us that the extreme reprehensibility of defendant's actions and the undercompensation of plaintiffs' individual losses outweigh the punitive element already contained to some extent in the individual compensatory damages awards."); *Hollock v. Erie Ins. Exch.*, 2004 Pa. Super. 13, ¶ 40 (Pa. Super. Ct. 2004) ("Unlike the compensatory award in *Campbell* which permitted recovery for emotional distress, the compensatory award in this case [attorneys' fees, costs, and interest only] did not include any punitive element."); *Roth v. Farner-Bocken Co.*, 2003 S.D. 80, ¶ 75 (S.D. 2003) ("In this case, where there was a substantial compensatory damage award containing a punitive element which fully compensated [plaintiff] for the harm caused, we find 'a punitive damages award at or near the amount of compensatory damages' is justified."); *Gibson v. Overnite Transp. Co.*, 2003 Wis. App. 210, ¶ 23 n.3 (Wis. Ct. App. 2003) ("Here, $22,000 of the $33,000 awarded for compensatory damages was for financial damages. As a result, the compensatory damage award had little, if any, punitive element."), both the Utah Supreme Court in *State Farm* and the Alabama Supreme Court here failed to do so. The opinion of the Utah Supreme Court in *State Farm* on remand, like the judgment of the Alabama Supreme Court in this case, demonstrates the confusion that remains in the lower courts surrounding the double-counting of punitive damages. Caremark respectfully requests that the Court demonstrate that it meant what it said—the "punitive element" of an award of compensatory damages should not be counted in calculating the permissible ratio for an award of punitive damages. *Compare State Farm*, 538 U.S. at 429

("An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages."), *with Campbell v. State Farm Mut. Auto. Ins. Co.*, 2004 WL 869188 at *9 (Utah April 23, 2004) (stating that this Court's "conclusion, though plausible as an abstract proposition, does not account for the circumstances of the compensatory damages award in this case").

This case presents an even more compelling example of unlawful double-counting than *State Farm*. There, the trial court had granted a remittitur of a portion of the plaintiffs' emotional distress damages. Furthermore, those emotional distress damages were the only compensatory damages the plaintiffs received; they were, at least in part, truly compensatory. Here, by contrast, there has been no remittitur, and Johnston's "fraud" damages were in *no* part compensatory; by his own testimony, he was fully compensated by the breach of contract damages. Therefore the Alabama Supreme Court's refusal in this case to properly evaluate the punitive damages award in light of this court's opinion in *State Farm* was particularly prejudicial.

For these reasons, this Court should grant certiorari in this case to clarify the due process problems inherent in "double-counting" punitive damages. This case presents a starkly compelling example of such unconstitutional double-counting, because the only "compensatory" damages which could support the punitive award in this case are entirely punitive themselves. However, the Court may wish instead to grant certiorari in *State Farm*, clarifying its position using ground already tilled. In that event, if this Court decides *State Farm* in favor of the petitioner on the ground that the Utah Supreme Court impermissibly double-counted the punitive damages against State Farm, this Court should grant

Caremark's petition, vacate the judgment below, and remand the case to the Alabama Supreme Court for reconsideration in light of this Court's ruling in that case.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, should the Court grant certiorari in *State Farm*, the petition should be held pending the Court's decision in that case, and then should be disposed of as appropriate in light of that decision.

Respectfully submitted,

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Counsel for Caremark Rx, Inc. (formerly MedPartners, Inc.)

September 20, 2004

APPENDIX A

[SEAL]

IN THE SUPREME COURT OF ALABAMA

May 14, 2004

1020026

CAREMARK RX, INC. f/k/a MEDPARTNERS, INC.

v.

J. BROOKE JOHNSTON

(Appeal from Jefferson Circuit Court: CV-98-4984).

CERTIFICATE OF JUDMENT

The appeal in this cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the court is affirmed.

IT IS FURTHER ORDERED that the cost of appeal be taxed against the appellant as provided by Rule 35, Alabama Rules of Appellate Procedure.

NO OPINION

JOHNSTONE, J.–HOUSTON. *See*, LYONS, and WOODALL, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record of said Court.

Witness my hand this 24th Day of August 2004

/s/ Robert G. Esdale
ROBERT G. ESDALE
Clerk, Supreme Court of Alabama

STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE SUPREME COURT
OCTOBER TERM, 2003-2004

[Filed May 14, 2004]

1020026

CAREMARK RX, INC. f/k/a MEDPARTNERS, INC.,

v.

J. BROOKE JOHNSTON.

Appeal from Jefferson Circuit Court, CV-98-4984.

JOHNSTONE, *Justice*.

AFFIRMED. NO OPINION

See Rule 53(a)(1) and (a)(2)(B) and (f), Ala. R. App. P. HOUSTON, *See*, LYONS, and WOODALL, JJ., concur.

APPENDIX B

IN THE SUPREME COURT OF ALABAMA

[SEAL]

August 13, 2004

1020026

CAREMARK RX, INC. f/k/a MEDPARTNERS, INC.,

v.

J. BROOKE JOHNSTON.

(Appeal from Jefferson Circuit Court: CV-98-4984)

ORDER

IT IS ORDERED that the application for rehearing filed in this cause is overruled.

Application for Rehearing Overruled. No Opinion.

JOHNSTONE, J.–HOUSTON. *See*, LYONS, and WOODALL, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record of said Court.

Witness my hand this 13th. Day of August 2004

/s/ Robert G. Esdale-
ROBERT G. ESDALE
Clerk, Supreme Court of Alabama

APPENDIX C

[SEAL]

IN THE SUPREME COURT OF ALABAMA

August 31, 2004

1020026

CAREMARK RX, INC. f/k/a MEDPARTNERS, INC.

v.

J. BROOKE JOHNSTON.

(Appeal from Jefferson Circuit Court: CV-98-4984)

NOTICE

Emergency motion for stay of execution of Caremark RX, Inc. is denied.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record of said Court.

Witness my hand this 24th. Day of August 2004.

/s/ Robert G. Esdale
ROBERT G. ESDALE
Clerk, Supreme Court of Alabama

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

[Filed Aug. 31, 2004]

Case No: 1020026

CAREMARK RX, INC. (formerly MEDPARTNERS, INC.),
Appellant,

vs.

J. BROOKE JOHNSTON, JR.,
Appellee.

On Appeal from The Circuit Court of Jefferson County,
Case No. CV 98-4984

EMERGENCY MOTION FOR STAY OF EXECUTION
OF CAREMARK RX, INC.

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IN THE SUPREME COURT OF ALABAMA

CAREMARK RX, INC. (formerly MedPartners, Inc.),
Appellant,

vs.

J. BROOKE JOHNSTON, JR.,
Appellee.

On Appeal from The Circuit Court of Jefferson County,
Case No. CV 98-4984

EMERGENCY MOTION FOR STAY OF EXECUTION

COMES NOW Caremark RX, Inc. and moves the Court to stay execution of the $1 million compensatory award and the $1 million punitive award entered by the trial court on the .fraud claim of J. Brooke Johnston, Jr. pending the filing and disposition of a petition for writ of certiorari to the United States Supreme Court. Caremark RX, Inc. intends to file with United States Supreme Court Justice Kennedy a motion to stay the judgment of the Alabama Supreme Court with respect to the fraud claim pending resolution of the petition for writ of certiorari that Caremark RX, Inc. will file with the United States Supreme Court. Caremark RX, Inc. is prepared to and will pay the portion of the trial court's judgment relating to J. Brooke Johnston, Jr.'s claim for breach of contract.

WHEREFORE, PREMISES CONSIDERED, Appellant, Caremark RX, Inc., respectfully requests this Court to stay execution of the aforementioned judgment.

/s/ Deborah Alley Smith
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CERTIFICATE OF SERVICE,

TO: The Clerk of the Supreme Court of Alabama

Case No. 1020026

CAREMARK RX, INC. (FORMERLY MEDPARTNERS, INC.),
Appellant,

vs.

J. BROOKE JOHNSTON
Appellee.

I certify that I have this date served a copy of the foregoing Emergency Motion for Stay of Execution on counsel of record for all parties to this appeal by placing a copy of same in the United States mail, first class postage prepaid and addressed as follows:

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Dated this the 31st day of August, 2004

/s/ [ILLEGIBLE]
Counsel for Appellant

APPENDIX E

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

[Filed August 19, 2002]

CASE NO.CV 98-4984

CAREMARK RX, INC. (formerly MEDPARTNERS, INC.),
Plaintiffs,

vs.

J. BROOKE JOHNSTON, JR.,
Defendant.

ORDER

THIS CAUSE is considered upon motions by the Plaintiff/counter-Defendant, Caremark Rx., Inc, (formerly, MedPartners, Inc,] ("Caremark"), for judgment as a meter of law or, in the alternative for a new trial or remittitur. The Motions were argued and submitted with briefs on May 16, 2002. By stipulation the parties agreed, in writing, to extend the period for the Court to rule on rheas post trial motions to August 20, 2002. This action is the result of a dispute between the Defendant/Counter-Plaintiff ("Johnston") who was the former General Counsel of MedPartners and Caremark. In January 1998, there was a substantial shake-up at Caremark which was than MedPartners, Inc., that resulted in the removal of Larry House as CEO of the company, As a result of this "change of control" certain corporate officers, including Johnston, sought to terminate their employment and enforce the provisions of alleged employment contracts with the company. Caremark filed a declaratory judgment action to

determine the validity of these employment contracts. In response Johnston filed counterclaims alleging breach of contract and fraud. Caremark then amended its original complaint to add a myriad of claims, including breach of contract, breach of fiduciary duties, fraud, negligence, and conspiracy. This action was vigorously contested in extensive pretrial motions, multiple mediations and finally in a lengthy jury trial involving numerous and impressive witnesses for bath sides. At the end of the day, however, the jury rejected Caremark's claims and found in favor of Johnston on his breach of contact and fraud claims. The jury, in response to interrogatories, held that Johnston's employment agreement was valid and awarded the sum of One Million Eight Hundred Sixty Thousand and 00/100 Dollars ($1,860,000.00) as compensatory damages for the breach thereof, In addition, the jury awarded Johnston One Million and 00/100 Dollars ($1,000,000.00) as compensatory damages on his fraud claim and an additional One Million and 00/100 Dollars ($1,000,000.00) as punitive damages resulting in a total award of Three Million Eight Hundred sixty Thousand 00/000 Dollars ($3,860,000.000), By agreement of the parties the Court calculated the interest due on the contract claim and determined the interest due thereon was in the sum of Four Hundred Two Thousand Six Hundred Seventy-two and 75/100 Dollars ($402,672,75), Accordingly, a judgment was entered in favor of Johnston in the sum of Four Million Two Hundred Sixty-two Thousand Six Hundred Seventy-two and 75/ 100 !Dollars ($4,262,672.75). Caremark argues that these awards were not supported by substantial evidence and, therefore should be either reduced or set aside entirely.

In support of his breach of contract claim Johnston submitted evidence of benefits due as severance compensation under the contract in the approximate amount of Two Million and 00/100 Dollars ($200,000.00). This amount was essentially the same amount calculated by Caremark's financial officer, Charles Wingard. The evidence further

indicated that Johnston had received a retention bonus of One Hundred Forty Thousand and 00/100 Dollars ($140,000.00), provided that he remain with the company for one year from the date of said bonus. Johnston terminated his employment in less than a year and therefore his bonus was due to be refunded. Thus, the award of One Million Eight Hundred Sixty Thousand Dollars ($1,860,000,00) as compensatory damages on the breach of contract claim was supported by the evidence submitted in this cause.

Johnston further submitted evidence that in January 1998, the acting CEO, Richard Scrushy, represented to him that if Johnston would remain with the company during the period of the corporate realignment that his employment agreement would be honored in the event that he subsequently terminated his employment Johnston testified that in reliance upon this representation he continued his employment with Caremark and relinquished an opportunity to return to his previous law firm as planned. Johnston testified that Scrushy's representation, whether innocently, deliberately or recklessly, was false and as a result he sustained damages. He testified that at the time he left his employment with Caremark he had lost his opportunity to return to his old firm and that he was forced to begin a new law practice which would take five years to build to the point that he was earning compensation that was equal to the compensation he was earning at Caremark and which he would earn at his old firm of approximately Two Hundred Thousand Dollars ($200,000.00) per year, The jury, therefore could believe that Johnston sustained compensatory damages in the sum of One Million Dollars ($1,000,000.00) as a result of the mis-representation.

Finally, the jury in its discretion awarded Johnston the sum of One Million Dollars ($1,000,000.00) as punitive damages, Caremark strenuously argues that this award was unsupported by the evidence and should be substantially reduced or

entirely remitted, The Court has considered the guidepost required in a *Hammond-Green* tail review. The award is well within the acceptable ratio of punitive damages to actual or likely harm and the cost of litigation is still pending before the Court for determination, therefore these guideposts are met. The other guideposts of (1) sanctions for comparable misconduct; (2) removing the Defendant's profit; (3) criminal sanctions; and (4) other civil actions against the same Defendant are not applicable in this action. Nor is the financial position of the Defendant since the Defendant has conceded that the punitive damage award would not substantially impact its financial position. Therefore, the degree of reprehensibility of the conduct of the Defendant is the only guidepost that may be relevant. Johnston submitted evidence that Mr. Scrushy's representation regarding his continued employment under the alleged employment agreement was either innocent, deliberate or reckless. Scrushy denies even making the alleged representation. This clearly presents a question of fact for the jury. In viewing the evidence the Court ends that the reprehensibility of the conduct of the Defendant in this action is low, however, the evidence could substantiate the punitive damage award if the jury believed that the representations were either reckless or deliberate and subsequently, Caremark made a deliberate decision to repudiate the contracts regardless of the prior representations of Mr. Scrushy.

Caremark specifically moved the Court to reduce the punitive award to Two Hundred Fifty Thousand Dollars ($250,000.00), which is the statutory cap provided in § 6 11-21, Alabama Cody. In *Henderson v. Alabama Power Company*, 627 So.2d 879, our Supreme Court specifically held this statute to be unconstitutional; therefore, this Court declines to grant Caremark's motion for reduction of the award.

In addition, the Court reviewed and considered all of the grounds submitted by Caremark and finds that these grounds are not sufficient to require the Court to overturn the verdict of the jury, Accordingly, the Court finds that there is amble and sufficient evidence to support the jury verdict rendered in this cause and therefore, the Motions for Judgment as a Matter of' Law, Motion for a New Trial and Motion for Remittitur by Caremark is OVERRULED.

DONE and ORDERED this the 18th day of August, 2002.

/s/ G. William Noble
G. WILLIAM NOBLE
CIRCUIT JUDGE

GWN/cs
cc: All parties.

APPENDIX F

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY ALABAMA

[Filed Feb. 21, 2002]

CASE NO. CV 98-4984

CAREMARK RX, INC. (formerly MEDPARTNERS, INC.)
Plaintiff,

vs.

J. BROOKE JOHNSTON, JR.,
Defendant.

AMENDED FINAL ORDER

THIS CAUSE came on for trial on January 29, 2002. This action was commenced by MedPartners, Inc. which, subsequent to the filing of its Complaint, changed its name to Caremark Rx, Inc. These two names are used interchangeably and are one and the same party. The Defendant/Counter-Plaintiff is J. Brooke Johnston, Jr.

At the conclusion, of the Plaintiff's evidence and at the conclusion of all of the evidence, both the Plaintiff and Defendant moved for a judgment as a matter of law. The motions of both parties were granted in part, with only the following claims remaining viable: 1) Johnston's claim of fraud, 2) Johnston's claim of breach of contract, 3) Caremark Rx Inc.'s claims of fraud and negligence relating to SEC filings, press releases, and due diligence, 4) Caremark Rx Inc.'s claims of fraud and negligence as to the Talbert

acquisition and 5) Caremark Rx Inc.'s claims of breach of contract.

Prior to the submission of this cause to the Jury both parties filed written requests for instructions, which requests were either incorporated in the Court's oral charge or denied.

The Jury commenced its deliberation on February 12, 2002, and returned the following verdicts and interrogatories on February 13, 2002, which are attached hereto as Exhibit "A" and are incorporated herein.

Pursuant to the jury verdicts in this matter, a judgment is entered on the claims of Caremark Rx, Inc. in favor of J. Brooke Johnston, Jr. and against Caremark Rx, Inc., formerly known as MedPartners, Inc.

The parties agreed prior to the submission of this cause to the jury that, if applicable, the Court would calculate interest due on the contract claims. The jury having found in favor of the Counter-Plaintiff, J. Brooke Johnston, Jr., on his contract claim the Court finds that interest should be calculated from July 7, 1998, until February 13, 2002, at the rate of six (6%) percent per annum, which sum is Four Hundred Two Thousand Six Hundred Seventy-two and 75/100 Dollars ($402,672.75).

Accordingly, judgment is entered on the counter-claims of J. Brooke Johnston, Jr. in favor of the Defendant/Counter-Plaintiff J. Brooke Johnston, Jr., and against the Plaintiff/Counter-Defendant, Caremark Rx, Inc., formerly known as MedPartner's Inc., in the sum of Three Million Eight Hundred Sixty Thousand and 00/100 Dollars ($3,860,000.00) plus interest in the amount of Four Hundred Two Thousand Six Hundred Seventy-two and 75/100 Dollars ($402,672.75), for a total of Four Million Two Hundred Sixty-Two Thousand Six Hundred Seventy-two and 75/100 Dollars ($4,262,672.75).

The Court finds that there is no just reason for delay in entry of partial final judgment and expressly directs the entry of partial final judgment pursuant to Rule 54(b) of the *Alabama* Rules of *Civil Procedure*.

Costs are taxed to the Plaintiff, Caremark Rx, Inc.

DONE and ORDERED this the 21st day of February, 2002.

/s/ G. William Noble
G. WILLIAM NOBLE
CIRCUIT JUDGE

GWN/cs
cc: All parties.

APPENDIX G

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

[Filed February 13, 2002]

CASE NO: CV 98-4984

MEDPARTNERS, INC.,

Plaintiffs,

vs.

J.BROOKE JOHNSTON,

Defendant.

COUNTERCLAIMS BY JOHNSTON AGAINST MEDPARTNERS VERDICT IN FAVOR OF JOHNSTON

On the counterclaims by J. Brooke Johnston against MedPartners, we, the Jury, find in favor of J. Brooke Johnston and against MedPartners as follows:

1. For breach of the Employment Agreement, we assess Johnston's damages at one million eight hundred sixty thousand dollars ($1,860,000).

2. For fraud, we assess Johnston's damages as follows:

   Compensatory damages: one million dollars ($1,000,000).

   Punitive damages: one million dollars ($1,000,000).

It is our intention to assess total damages to the Plaintiff at: Three million eight hundred sixty thousand dollars ($3,860,000).

/s/ Michael C. Pruitt
FOREPERSON

Fill in blank spaces both in words and figures the amount arrived at by you.

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

[Filed February 13, 2002]

CASE NO. CV 98-4984

MEDPARTNERS, INC.,

Plaintiffs,

vs.

J. BROOKE JOHNSTON,

Defendant.

INTERROGATORIES TO THE JURY

1. Is the Employment Agreement between MedPartners and Johnston valid?

YES X NO ___

2. Did Johnston breach the Employment Agreement?

YES ___ NO X

3. What amount of damage, if any, did Johnston's breach of the Employment Agreement cause to MedPartners?

_____ Dollars

($0)

(*fill in the amount in words and figures*)

4. Did MedPartners breach the Employment Agreement?

YES X NO ___

5. What amount of damage, if any, did MedPartners' breach of the Employment Agreement cause to Johnston?

One million eight hundred sixty thousand Dollars ($1,860,000)

(*fill in the amount in words and figures*)

/s/ Michael C. Pruitt
FOREPERSON

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

[Filed February 13, 2002]

CASE NO. CV 98-4984

MEDPARTNERS, INC.,

Plaintiffs,

vs.

J. BROOKE JOHNSTON,

Defendant.

CLAIMS BY MEDPARTNERS AGAINST JOHNSTON—
VERDICT IN FAVOR OF JOHNSTON

"On the claims by MedPartners against J. Brooke Joohnston, we, the jury, find in favor of J. Brooke Johnston.

/s/ Michael C. Pruitt
FOREPERSON

No. 04-396

SUPREME COURT, U.S.
FILED
OCT 2 2 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CAREMARK RX, INC.
(FORMERLY MEDPARTNERS, INC.),

Petitioner,

v.

J. BROOKE JOHNSTON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENT JOHNSTON'S BRIEF IN OPPOSITION

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October 22, 2004

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QUESTIONS PRESENTED

1. Whether the purported "double-counting" federal due process issue was adequately presented below when Petitioner Caremark first mentioned this issue in its application for rehearing in the Supreme Court of Alabama.

2. Whether the purported "double-counting" issue presents a substantial federal due process issue, e.g., when the state courts have decided that the compensatory damages for fraud are a separate and distinct category of compensatory damages that do not duplicate the breach of contract damages.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondent Johnston states the following:

1. Caremark Rx, Inc. (formerly known as MedPartners, Inc.), has no parent company, and no publicly held company owns 10% or more of its stock.

2. At the time the events relevant to this lawsuit occurred (e.g., 1998), the corporation's name was "MedPartners, Inc." To be consistent with the names used in the Petition, this brief will use only the name "Caremark," even though the corporation was known as MedPartners at the time the particular events being discussed actually occurred.

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Scrushy Indicted on 85 Counts: Former HealthSouth Chief Added Roughly $2.7 Billion in Fictitious Earnings, Alleges the Department of Justice, www.cfo.com/article.cfm/3010823 1

STATEMENT OF THE CASE

A. Facts Material to the Question Presented

Rule 15.2 of the Rules of this Court requires that "any perceived misstatement of fact" be addressed in respondent's brief in opposition. Respondent Johnston does object to certain allegations of "fact" contained in the Petition, at pp. 2-4.

Page 3, beginning of last paragraph, argues that Johnston's fraud claim was based upon his oral conversation "with one member of Caremark's board." Johnston's conversation was actually with Caremark's acting CEO, the now-notorious Richard Scrushy.[1] Caremark's Appellant's Brief, filed in the Alabama Supreme Court on December 19, 2002, admits, at pp. 28-29, that the Johnston-Scrushy conversation took place on January 16, 1998, and that, as of January 16, 1998, Richard Scrushy was Caremark's acting CEO.

The jury verdict (App. G) and judgment (App. F) awarded Johnston compensatory damages for breach of contract in the amount of $2,262,672.75, including prejudgment interest. Also awarded were $1 million in compensatory damages for fraud and $1 million in punitive damages for fraud. *Id.* At the middle of p. 3 of the Petition, Caremark argues that the facts proved that the compensatory damages for fraud were identical to the breach of contract damages. Thus, at the bottom of p. 3, the Petition

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[1] See, as examples, Press Release, *SEC Charges HealthSouth Corp. CEO Richard Scrushy With $1.4 Billion Accounting Fraud*, www.sec.gov/news/press/2003-04.htm and *Scrushy Indicted on 85 Counts: Former HealthSouth Chief Added Roughly $2.7 Billion in Fictitious Earnings, Alleges the Department of Justice*, www.cfo.com/article.cfm/3010823.

argues that the $1 million of compensatory damages for fraud were really "entirely punitive in nature."

Johnston disputes this allegation of "fact" and the legal argument drawn therefrom. Johnston never testified that his fraud damages were the same as his contract damages. The breach of contract damages were mostly a mathematical calculation from the terms of the employment contract (that is, the "purpose" for the severance payments is legally irrelevant). The compensatory fraud damages were for a completely different injury: Johnston's reliance damages incurred by staying with Caremark and foregoing returning to his former law firm, resulting in Johnston having to start from scratch to build back his own individual law practice.

Caremark never – prior to its May 28, 2004, Application for Rehearing in the Alabama Supreme Court – argued that the compensatory fraud damages duplicated the breach of contract damages. This argument was obviously available to Caremark at the trial court stage of litigation, notwithstanding the fact of what appellate cases had not yet been decided.

The jury and the trial court determined that the compensatory fraud damages did exist and were not cumulative to the damages already awarded for breach of contract. Caremark is seeking to make this Court into a thirteenth juror to re-try the facts of the case. As argument, Johnston points out that "[t]he Supreme Court ordinarily does not sit to decide questions of fact." 20 Charles Alan Wright and Mary Kay Kane, Federal Practice and Procedure Deskbook §115, p. 1083 (2002). "On review of decisions of state courts, the stated rule is that 'all those matters which are usually termed issues of fact

are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observation of this restriction in our review of State courts calls for the utmost scruple.'" *Id.*, quoting *Wolfe v. North Carolina*, 364 U.S. 177, 196 (1960).

Page 4 of the Petition boldly asserts that "Johnston presented no evidence that he suffered actual loss as a result of this alleged fraud." Johnston obviously hotly disputes this statement. The jury, the trial court, and the Alabama Supreme Court all found that legally sufficient evidence of damages had been presented. Fraud damages are discussed at pp. 42-50, 60, of Johnston's January 23, 2003, Appellee's Brief in the Alabama Supreme Court. Also at p. 4 of the Petition, Caremark repeats its arguments from previous briefs about what Johnston did not prove (e.g., his income). As pointed out at pp. 50-54 of his January 23, 2003, Appellee's Brief, Alabama follows the general rule that post-termination earnings are a matter of mitigation, so the burden of proof on that issue is on the defending party, Caremark.

B. How the Federal Question was Raised

The issue (see p. i of Petition) is whether the $1 million of punitive damages is an unconstitutional "double-counting" because the underlying compensatory damages are themselves punitive in nature (according to Caremark). Caremark admits (Petition at p. 5, line 13) that the first time it made this argument was in its Application for Rehearing to the Alabama Supreme Court, filed on May 28, 2004, after that Court had affirmed the judgment. As argued below, this comes too late to preserve that issue for review.

In its Appellant's Brief of December 19, 2002, to the Alabama Supreme Court, Caremark did not argue that the amount of punitive damages was unconstitutionally excessive. There was no argument based upon the ratio between punitive and compensatory damages. No due process argument of any sort was asserted.

REASONS FOR DENYING THE PETITION

I. THE ISSUE PRESENTED BY CAREMARK WAS NOT PRESERVED FOR REVIEW BECAUSE IT WAS FIRST RAISED IN ITS APPLICATION FOR REHEARING IN THE STATE SUPREME COURT.

Alabama follows the general rule that arguments or issues cannot be raised for the first time in an application for rehearing. See *SouthTrust Bank v. Copeland One, L.L.C.*, ___ So.2d ___, No. 1020727, 2003 WL 22064062, * 5 (Ala. Sept. 5, 2003) (Application for Rehearing Overruled March 12, 2004):

> Matters not argued in an appellant's brief on original submission cannot be raised for the first time on application for rehearing. As this Court recently recapitulated this rule: "[Respondent] raises [this argument] for the first time in its application for rehearing. . . . 'We can not sanction the practice of bringing up new questions for the first time, in an ex parte application for rehearing.' *Robinson v. Allison*, 97 Ala. 596, 604, 12 So. 604 (1893) (on application for rehearing). 'We cannot sanction the practice of bringing up new questions for the first time in application for rehearing.' *Kirkland v. Kirkland*, 281 Ala. 42, 49, 198 So.2d 771, 777 (1967) (on application for

> rehearing). 'We cannot sanction the practice of bringing up new questions for the first time in applications for rehearing.' *Cole v. Cole Tomato Sales, Inc.*, 293 Ala. 731, 735, 310 So.2d 210, 212 (1975) (on application for rehearing). 'New supporting arguments presented for the first time on rehearing generally will not be considered.' *Stover v. Alabama Farm Bureau Ins. Co.*, 467 So.2d 251, 253 (Ala.1985) (on application for rehearing). '[T]his argument was raised for the first time on application for rehearing, and therefore will not be considered.' *Schulte v. Smith*, 708 So.2d 138, 141 n. 2 (Ala.1997) (on application for rehearing)." *Ex parte Lovejoy*, 790 So.2d 933, 938-39 (Ala.2000).

See also *Water Works and Sewer Bd. of the City of Selma v. Randolph*, 833 So.2d 604, 608 (Ala. 2002): "The well-settled rule of this Court precludes consideration of arguments made for the first time on rehearing." *Alabama Power Co. v. Cantrell*, 507 So.2d 1295, 1304-05 (Ala.1986), appeal dismissed by *Alabama Power Co. v. Cantrell*, 486 U.S. 1028 (1988), held that a federal due process attack on the $1 million punitive damages award could not be made for the first time in an application for rehearing.

The phrases "drawn in question" and "specially set up or claimed under the constitution," in 28 U.S.C. §1257(a) "mean that the federal question must have been duly raised in the state court." 12 James William Moore, Helen I. Bendix, and Brett A. Ringle, Moore's Federal Practice ¶510.01, 8-56 (2d ed. 1993). "In reviewing the judgments of state courts . . . the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below." *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992). "[I]t is our practice, when reviewing decisions

by state courts, not to decide federal claims that were not 'pressed or passed upon' below." *Clark v. Jeter*, 486 U.S. 456, 458 (1988). There is "a weighty presumption against review" of claims not pressed below. *Heath v. Alabama*, 474 U.S. 82, 87 (1985). The reasons for this strict rule include: (1) presentation of the federal issue to the state court helps ensure that an adequate record is made; (2) it gives due regard to appropriate relations between the Supreme Court and state courts; and (3) it gives the state court a chance to rely on state grounds. *Illinois v. Gates*, 462 U.S. 213, 221-22 (1983). Also, a reasoned state court opinion on the issue may obviate the need for plenary consideration by the Supreme Court. *Webb v. Webb*, 451 U.S. 493, 501 (1981).

At minimum, "there should be no doubt from the record that a claim under a federal statute on the Federal Constitution was presented in the state courts and that those courts were apprised of the nature of substance of the federal claim *at the time and in the manner required by state law.*" *Id.* (emphasis added). Alabama appellate courts will not consider issues raised for the first time on appeal. This Court recognized this principle in the Alabama case of *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n. 3 (1983), where it was said that this Court had "no jurisdiction" to consider an argument made for the first time to the Alabama Supreme Court. "The general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal." *Id.* Also, when the state Supreme Court does not discuss the federal issue [as in this case], it is assumed that the omission was because the issue was not procedurally raised in a timely or proper

manner. The aggrieved party has the burden of showing the contrary." *Id.*[2]

Board of Directors of Rotary International v. Rotary Club of Durate, 481 U.S. 537, 549 (1987), refused to review a constitutional question which was first clearly raised in the state supreme court application for rehearing. The state court denied the application without opinion [like in this case], and this Court assumed that action was based upon the failure to timely present the issue. See also *Prudential Federal Savings & Loan Association v. Flanigan*, 478 U.S. 1311 (1986) (rehearing too late). "The long-established general rule is that an initial attempt to raise a federal question after judgment by the highest court, upon a petition for rehearing, comes too late, unless that court actually entertains the question and decides it." Moore's, *supra*, at p. 8-61.

Adams v. Robertson, 520 U.S. 83, 85 (1997), dismissed the writ as improvidently granted because "[t]he Alabama Supreme Court did not address this federal issue, and it is now apparent that petitioners have failed to establish that they properly presented the issue to that court." At 89-90, this Court explained: "Petitioners also note that they

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[2] See *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997): "As petitioners concede" here, the Alabama Supreme Court did not expressly address the question [presented]. Nor have petitioners met their burden of showing that the issue was properly presented to that court. When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, [citations omitted] and the aggrieved party bears the burden of defeating this assumption. . . ." See also *Street v. New York*, 394 U.S. 576, 582 (1969) ("Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.").

raised their federal due process claim in their petition for rehearing before the Alabama Supreme Court. . . . [W]e have generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question. Petitioners having thus failed to carry their burden of showing that the claim they raise here was properly presented to the Alabama Supreme Court, we will not reach the question presented." (internal citation omitted).[3]

"The federal question must have been raised in a proper and timely manner in the state courts." 20 Charles Alan Wright and Mary Kay Kane, Federal Practice and Procedure Deskbook §114, p. 1062 (2002). "The timeliness with which the federal question is raised in the state court is critical. This is largely a matter for the state to regulate by its own procedural rules. Failure to raise the question at the stage of the proceedings required by state law will preclude review. . . . *It is too late to raise a federal question by petition for rehearing to the state appellate court*, except when the decision *of that court* has given rise unexpectantly to a federal question that the party seeking review has had no previous opportunity to assert and could not fairly have anticipated." *Id.* at 1063-64. (emphasis added).

In this case, Caremark did not timely present its federal issue to the Alabama Supreme Court, and that Court did not pass on the federal issue. Caremark's failure

[3] At 87 n. 1, *Adams* also noted that the federal due process issue was [as in our case] *not* included in the statement of the issues section of appellant's brief, and, under Alabama law, that is another procedural waiver to the later attempt to raise a new issue in an application for rehearing.

to properly raise the issue below precludes review by this Court.

It does Caremark no good to point out that *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), was not decided until April 7, 2003, over three months after Caremark filed its Appellant's Brief in the Alabama Supreme Court. First, the *Campbell* case was argued prior to Caremark's Appellant's Brief being filed. All the *Campbell* briefs had already been filed, so the "double-counting" argument was already out there in the public domain prior to Caremark's filing of its Appellant's Brief.

Second, Caremark made absolutely no attempt to bring the *Campbell* opinion and the "double-counting" issue to the attention of the Alabama Supreme Court (until after the Court ruled against Caremark). The Alabama Supreme Court affirmance occurred on May 14, 2004. Caremark had over 13 months to argue *Campbell* and "double-counting" to the Alabama Supreme Court, via a supplemental brief, or otherwise. Instead, Caremark elected to wait and see whether the Alabama Supreme Court would rule in its favor. It is a form of unfair "sandbagging" for Caremark to raise the "double-counting" argument only after it loses its appeal.

The Alabama Supreme Court will permit supplemental briefs when material new case law is released during the pendency of an appeal. Examples include *Ex parte Clarke*, 728 So.2d 135, 140 n. 1 (Ala. 1998) ("After this Court released its opinion in *Nilsen*, Allstate filed in this present case a motion for leave to file an additional brief discussing *Nilsen*, and it conditionally filed the brief. The Court has granted that motion. . . ."); *Ex parte Masonite Corp.*, 681 So.2d 1068, 1079 (Ala. 1996) (Maddox, J., concurring

in the result in part and dissenting in part) ("While this petition was pending, the United States Court of Appeals for the Fifth Circuit, in *Castano* . . . , decertified a class. . . . Although I was aware of the *Castano* decision as soon as it was released, the petitioners have filed a supplemental brief in which they correctly point out that the underlying facts of this present class suit are remarkably similar to the facts presented in *Castano*."); and *Ex parte Employers Ins. of Wausau*, 590 So.2d 888, 891-92 (Ala. 1991) ("two days before these petitioners were argued before this Court, a district court of appeal of the State of California ruled. . . . We do note that the petitioners, in a supplemental brief filed in this Court subsequent to the California District Court of Appeals' ruling, argue. . . .). In the case at bar, Caremark never even attempted to file a supplemental brief to raise the *Campbell* "double-counting" issue in the 13-month period prior to the Alabama Supreme Court's ruling on the merits of Caremark's appeal.

Third, there is nothing about the *Campbell* opinion that created, for the first time in legal history, this so-called "double-counting" issue. Justice Kennedy's majority opinion in *Campbell* draws upon earlier opinions for the "double-count" quotation from which Caremark derives the catch-phrase for its purported due process issue. The only mention of "double-counting" in the *Campbell* opinion is at 538 U.S. 423, wherein Justice Kennedy quotes Justice Bryer's concurring opinion from *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 593 (1996): "Larger damages might also 'double-count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover."

Caremark simply has no excuse nor explanation for why it did not raise its purported federal due process issue at some point prior to the application for rehearing stage.

II. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

Certiorari jurisdiction exists only when a state court "has decided an important federal question." Rule 10(b), Rules of the United States Supreme Court. "To afford the basis for review, the federal question must be substantial." Moore's, *supra*, at ¶512.01, p. 8-73.

Even if the so-called "double-counting" issue might ever have any substance, this case presents a poor vehicle for discussing or applying this issue because the Alabama courts did not address this issue and Caremark did not properly present this issue in state court. As noted in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955):

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

The major premise of the Petition is that the entire $1 million compensatory award for fraud must be viewed as

punitive damages because all the compensatory damages in this case are completely subsumed within the approximately $2 million award for breach of contract damages. This premise is unsupported by the record and must be rejected. The jury found, as a fact, that separate, nonduplicative compensatory injury was caused by the fraud [separate from the breach of contract damages]. Caremark did not challenge that finding in any post-trial motion or appellate brief (prior to its application for rehearing).[4]

This Court is powerless to redetermine the state court's findings of fact. By analogy, the finding of fact that destroys Caremark's premise is an adequate and independent state ground to support the judgment. See 20 Charles Alan Wright and Mary Kay Kane, Federal Practice and Procedure Deskbook §114, p. 1065 (2002):

> The most important, and most difficult, limitation on Supreme Court review of state-court decisions has been well stated by Justice Jackson: "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. * * * The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning

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[4] See *Osorio v. K & D Erectors, Inc.*, __ So.2d __, Nos. 2010756 and 2010813, 2003 WL 2007812, *5 (Ala. Civ. App. May 2, 2003) (Application for Rehearing Overruled Sept. 12, 2003): "Also, this court may not hold the trial court in error based on theories or arguments that the appellant did not present to the trial court, or, for that matter, to the appellate court on original submission. *McLemore v. Fleming*, 604 So.2d 353 (Ala. 1992); *Smith v. Equifax Servs., Inc.*, 537 So.2d 463, 465 (Ala. 1988) (our supreme court noted the "long-standing, well established rule that [in order to secure a reversal] the appellant has an affirmative duty of showing error upon the record)."

> of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." [Quoting *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)].

The record in this case does not present the issue that Caremark wishes to be reviewed. Caremark argues now that the $1 million compensatory fraud award is really an additional punitive award (thus, according to Caremark, the ratio of punitive damages is infinite because there is no compensatory award against which to measure the amount of punitive damages).

First, Caremark never [until the rehearing stage] argued that the $1 million compensatory fraud award was not really "compensatory" damages at all. The state court finding of fact – that separate compensatory damages for the fraud do exist – must stand. Caremark never argued that the fraud compensatory damages were duplicative, and Caremark never argued that the amount of punitive damages was unconstitutionally excessive (not until rehearing). Because there *is* a $1 million dollar compensatory award [even ignoring the breach of contract damages], there *is* a compensatory measuring stick, and a one-to-one ratio of punitive to compensatory damages is not even argued to be excessive.

Second, even if the $1 million of fraud compensatory damages are really "punitive," the resulting total of $2 million of punitive damages is not excessive. In performing the mathematical ratio calculation, Caremark conveniently ignores the compensatory breach of contract damages of over $2.2 million. Taking the compensatory contract damages into account, the ratio of punitive damages to compensatory damages is slightly less than one-to-one, even under Caremark's "double-counting" scenario. It would be inconsistent for Caremark to ignore the contract damages because it is Caremark who insists[5] that the fraud compensatory damages are exactly the same category of compensatory damages already awarded for breach of contract. Pages 6-7 of the Petition assert that "the 'fraud' damages were entirely duplicative of the breach of contract damages. . . ."

Third, the facts of this case are truly unique. They are so case-specific, that a review of this case by this Court would not result in any broad rules of law generally applicable throughout the nation to thousands of similar cases. A review of this case would merely be a factual review of one unusual case. This case is not the sort of case that is well-suited to certiorari review by the United States Supreme Court.

Note that p. 5 of the Petition argues for alternative relief: that this case be held, and then remanded, should this Court grant cert again in *Campbell II*. The second petition in *Campbell* has since been denied. *See State Farm*

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[5] See, for examples, the Petition at p. 3, lines 19-22, 33-34; p. 4, lines 18-21; p. 5, lines 24-25; p. 6, final three paragraphs; and p. 7, lines 15-24.

Mut. Auto. Ins. Co. v. Campbell, ___ U.S. ___, No. 04-116, 2004 WL 2074132, 73 USLW 3195 (Oct. 4, 2004) (cert. denied).

CONCLUSION

Respondent Johnston urges the denial of Caremark's petition for writ of certiorari.

Respectfully submitted this 22nd day of October, 2004.

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